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PATENT

on JANUARY 26, 2005

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1/26/05

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Date of
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Customer Number: 000201
Attorney Docket No.: **J6717(C)**
Appellant: Slavtcheff et al.
Serial No.: 10/022,457
Filed: October 29, 2001
FOR: COSMETIC PRODUCT WITH PROOF DEVICE

Group: 1615
Examiner: Isis A.D. Ghali
Edgewater, New Jersey 07020
January 26, 2005

BRIEF FOR APPELLANT

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Sir:

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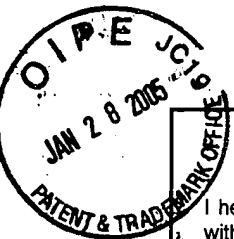
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Respectfully submitted,

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201-894-2403



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UNUS No.: 01-0456-CPI

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Sir:

This is a Brief on appellant's Appeal from the Examiner's Final Rejection
concerning the above-identified application.

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I. REAL PARTY IN INTEREST

Unilever Home & Personal Care USA, Division of Conopco, Inc. is the real party in interest.

II. RELATED APPEALS AND INTERFERENCES

There are no related appeals or interferences known to appellant, the appellant's legal representative, or assignee which will directly affect or be directly affected by or have a bearing on the Board's Decision in the pending Appeal.

III. STATUS OF CLAIMS

Claims 1-15 are pending in this application. In response to the first (Non-Final) Office Action, claims 1, 3-5, 8, 12, 14 and 15 were amended.

IV. STATUS OF AMENDMENTS

Subsequent to the final rejection, there were no amendments filed.

V. SUMMARY OF THE INVENTION

Claim 1 recites a cosmetic product system including a cosmetic composition and a test device packaged therewith. The composition has purpose for combatting signs of aging which efficacy a consumer self evaluates with a test device over an extended application period. See paragraph [0006], [0007] and [00019]. The test device includes a means for evaluating progress of the combat against the signs of aging after the

composition has been applied to an area of skin being monitored. See paragraph [0008]. The evaluation means includes first and second strips (2, 21) for taking an imprint of skin at different periods of time after the composition has been applied. See paragraph [00034] and page 7 (lines 10-13). Also included is an imaging card (8) for receiving and placing adjacent to one another the imprint from the first and second strip. See paragraph [00034].

Claim 2 further identifies the signs of aging described by claim 1 as including fine lines, wrinkles and combinations thereof. See paragraphs [0006] and [0007] and the original claim.

Claim 2 identifies the signs of aging as including sagging skin, age spots and combinations thereof. See the original claim.

Claim 4 recites the system of claim 1 as having first and second strips each including a water-insoluble substrate and a polymeric layer deposited onto the substrate, the layer being conformable to skin topography when placed against the area of skin being monitored. See paragraph [0009] and the original claim.

Claim 5 recites the system according to claim 4 wherein the polymeric layer is adhesive. See paragraph [00021].

Claim 6 depends through claim 5 specifying the adhesive as being a polymer selected from the group consisting of acrylates, starches, gums, polyvinyl alcohol and mixtures thereof. This is an original claim finding additional support in the illustrative materials of paragraphs [00040], [00041] and [00042].

Claim 7 describes the system of claim 4 wherein the test device further comprises a protective cover substrate (4) positioned over the polymer layer, the cover substrate being removed prior to application of the polymeric layer against the area of skin to be monitored. See the original claim.

Claim 8 further describes the system as having first and second strips each comprising a water-insoluble substrate and imaging layer deposited thereon, the layer being selectively sensitive to surface pretreatment, sebum, moisture, pH, temperature and topography. See paragraphs [00021] through [00026].

Claim 9 recites the system according to claim 1 wherein an image of fine lines or wrinkles is formed on a component of the test device. This is an original claim.

Claim 10 recites the system according to claim 1 wherein a fixative is applied to the image. See paragraphs [00012] and [00013].

Claim 11 recites the system according to claim 10 wherein the fixative is selected from the group consisting of UV or natural light initiating polymerization hardening of the component forming the image. See paragraph [00015] and the original claim.

Claim 12 recites the system according to claim 1 wherein the test device comprises a material selected from a cellulosic, plastic or combination material test device, and the strip is placed into a carton alongside a container holding the cosmetic composition. See [00016].

Claim 13 recites the system according to claim 1 wherein the test device is incorporated as a panel segment of a carton protectively surrounding a container holding the cosmetic composition. See paragraph [00016] and the original claim.

Claim 14 recites the system according to claim 1 wherein the test device is detachably joined to a carton protectively surrounding a container holding the cosmetic composition, joinder of the test device being through a means selected from the group consisting of perforations, weakened carton wall and adhesive joinder. See paragraph [00016].

Claim 15 is an independent claim reciting a method whereby a consumer can evaluate efficacy of an anti-aging cosmetic product. The method includes providing to a consumer a kit including a proof tape having a support substrate with an adhesive on a surface thereof, the adhesive having sufficient tack to maintain an imprint of fine lines and wrinkles after removal of the tape from the skin; and a fixative device for maintaining the imprint for a time longer than would occur without the fixative. Further, the method includes applying the cosmetic product to the skin, placing the adhesive surface of the proof tape against the skin treated with the cosmetic product; removing the strip and contacting same with the fixative; and repeating the cosmetic product application and placement of proof tape steps at a future time with a second proof tape followed by comparison of patterns resulting from first and second proof tape applications to the skin. See paragraph [00017] and [00032] through [00034].

VI. ISSUES

Does claim 15 violate 35 U.S.C. § 112, second paragraph, for omitting a step of the method?

Are claims 1-15 obvious under 35 U.S.C. § 103(a) over GB 2 284 154 in view of US Patent 5,088,502?

Is claim 6 obvious under 35 U.S.C. § 103(a) over GB 2 284 154 in view of US Patent 5,088,502, and further in view of US Patent 6,270,783?

VII. GROUPING OF THE CLAIMS

All claims do not stand or fall together. The Board is request to consider the following grouping of claims.

Group I: Claims 1-11

Group II: Claims 12-14

Group III: Claim 15

VIII. APPELLANT'S ARGUMENTS

Does claim 15 violate 35 U.S.C. § 112, second paragraph, for omitting a step of the method?

Claim 15 was rejected under 35 U.S.C. § 112, second paragraph for being indefinite for omitting essential steps. The omitted steps were said to occur between step (B) after applying the cosmetic product and step (C) placing the adhesive surface of the strip against the skin. Clarification was required by the Examiner as to the time at which the adhesive strip is placed subsequent to application of the cosmetic product.

Appellant considers that the claims are fully definite and do not omit any essential steps. Time or timing of events is not a criticality. If the user is so inclined, the strip can be immediately applied after application of the cosmetic. This establishes a baseline. Yet it is similarly acceptable to establish a baseline hours or even days later.

The Examiner contends that were the adhesive strip to be placed immediately on the skin after application of the cosmetic product, the imprints of pores and fine lines would be inaccurate. It was argued that the skin would be masked or covered by the cosmetic product.

The cosmetic does not interfere with the imprint. Normally a good rub-in of cosmetic product will suffice to present a clean impressionable baseline testing surface. This procedure can then be repeated at six or eight weeks or at any further interval. Appellant's specification has outlined this in paragraph [00034]. The change in the imprint from the first (baseline) imprint to that taken by the second imprint some weeks later establishes the efficacy (or non-efficacy) of the applied cosmetic product.

The Examiner addresses the method from vantage of a scientist accurately seeking to determine with mathematical precision changes in fine lines and wrinkles. This is not what the present invention addresses. Method claim 15 is intended for the technically unsophisticated consumer. The method provides the consumer a simple uncomplicated tool, i.e. a proof tape for evaluating relatively gross changes. Extremely precise measurements are neither required by the consumer nor necessary.

Claim 15 was also indicated to be indefinite for the expression "fixative device" for purportedly not setting out the metes and bounds of the claim.

“Fixative device” is well illustrated in the specification. In paragraph [00027] “fixative” is identified as something for maintaining a developed image of a wrinkle for a sustained period of time. Fixation can be chemical in nature. Among the disclosed examples were UV or natural or fluorescent sensitive activatable monomers or oligomers blended into the adhesives. Once the adhesive has formed a wrinkle pattern, the light sensitive components now exposed to UV or natural or fluorescent light harden the impression. This is a fixation form.

Another example of a fixative system is found in paragraph [00028]. A blackened substrate serves as a receiving fixative device. A transparent strip receives a wrinkle imprint onto an adhesive surface. This image surface is then fixed by being overlain onto the blackened substrate. There is also described a reverse system. Here the imaged adhesive layer is on a darkened area and the fixative is a transparent sheet that receives the imprinted surface.

Appellant does not consider that the term fixative “device” is incorrect when fixation involves a chemical material. Fixative devices when utilizing a chemical material normally also involve some sort of mechanical aspect. For instance, the application at paragraph [00028] describes a fixative system employing a transparent or darkened attachment strip. There is both mechanical and material aspects to the strip.

Are claims 1-15 obvious under 35 U.S.C. § 103(a) over GB 2 284 154 in view of US Patent 5,088,502?

GB 2 284 154 was cited for disclosing the use of a cosmetic composition with a test device. A closer review of this reference reveals that the testing involved an

experimental clinical trial. Volunteer subjects were treated with a anti-elastase agent containing cosmetic composition. Test impressions were taken at various periods of time subsequent to the treatment. These impressions were analyzed by serious complex equipment. Impressions of the skin were examined using a binocular magnifier and the results delivered to an IBM computer with an apparently sophisticated image analysis software. These procedures are quite remote from those appropriate to a consumer performing self evaluation.

Unlike the reference, appellant's claims are directed to a test device that is packaged with the cosmetic composition. This test device is operated by the purchasing consumer. It is not a clinical tool. Appellant's test devices are simple to use. A first and second imprint are placed adjacent to one another. This allows an untrained consumer's eye to easily distinguish whether there is progress in eliminating the signs of aging. By contrast, the reference requires all sorts of complicated measurement devices including a computer, firmness gauge and printer to provide a read-out. See page 5 (lines 35-39). GB '154 does not disclose a packaged test device, nor a consumer self evaluating test device, nor an imaging card for receiving and placing adjacent to one another the imprint from first and second strips.

Appellant provides a consumer who has bought a cosmetic product with anti-aging advertising claims, a mechanism to establish proof of those advertising claims. Proof is provided through a strip or tape capable of taking a skin imprint. Over time, the consumer utilizes one and then another of the strips in application against the skin. The resultant imprint of the proof strip is a measure of the fine lines and wrinkles on the skin surface. The imprint is saved on a card awaiting a further test some days, weeks or months later. First and second (and subsequent) imprints are placed on a card one next to another. By lining up the progression of skin images, the consumer can evaluate

whether the product works for that person. The system has achieved success through Pond's® Dramatic Results facial products which package Proof Strips within a carton alongside the cosmetic product. This has for the first time allowed consumers to evaluate advertising claims.

Among the aspects of independent claims 1 and 15 lacking in the primary reference are: (1) a test device suitable for consumers to self evaluate themselves; (2) a package or kit which combines both the cosmetic composition and the test device together; and (3) a fixative device or imaging card receiving the wrinkle imprinted adhesive strip.

US 5,088,502 discloses a device for sampling the skin comprising an opaque, flexible substrate 12 with a dark colored light absorbing area 14 and a layer 16 of adhesive overlying the absorbing area. The light absorbing area was considered as constituting a dark colored substrate per the claims.

A major feature of the present invention is not simply to take imprint of fine lines and wrinkles. Rather there was sought a simple self-evaluation tool for measuring changes over a prolonged application period with respect to fine lines and wrinkles or other aging susceptible aspects of the human dermis. Without a simple mechanism for storing the imprint in an undisturbed state, the first sample would either undergo change or be lost. Appellant identified the need for some sort of a fixative arrangement that would be consumer use friendly.

US '502 does not disclose how an imprint can be protected for future reference. The method according to US '502 involves first removal of protective film 18. See column 2, lines 16-18. Any protection for the adhesive layer 16 provided by protective

film 18 occurs prior to use of the test device. Once the protective film 18 has been removed, it is discarded. An imprint of skin can then be taken by the combination of substrate 12 with a dark colored area 14 bearing an adhesive layer 16. Once the skin imprint is achieved on the surface of 16, there is no mechanism such as a transparent overlayer to cover and preserve that image for a future time.

Both of the references are deficient by not disclosing or suggesting that after an imprint is achieved, fixation is needed of the imprint to review at a future time and in a context outside of a clinical laboratory with expensive equipment. These references do not mention this problem nor provide any simple solution. For these reasons, the combination of art would not render independent claims 1 and 15 obvious.

By way of additional comment, appellant directs the Board to claim 1(ii). This section of the independent claim requires an imaging card for receiving and placing adjacent to one another the imprint from a first and second strip. Each of these strips represent a skin imprint taken at different periods of time after a cosmetic has been applied. Neither GB '154 nor U.S. '502 disclose an imaging card that receives imprints from a first and second strip. The importance of the adjacent placement of time separated skin imprints is the ability of a consumer to evaluate any skin changes. Absent disclosure of the imaging card with adjacent time separated imprints, the Examiner has failed to present a prima facie case of obviousness. A key element of the claims is missing from the combination of references.

Claim 15 should be considered separate from claim 1. The Board may consider method claim 15 in its recitation of a consumer self evaluation step as further nuanced than system claim 1.

Claim 12 recites the strip as being placed into a carton alongside a container holding the cosmetic composition. Variations of the combination of strip and cosmetic product packaged together is found in claims 13 and 14.

Both GB '154 and U.S. '504 involve test devices utilized by chemists in the laboratory. These are not operated by consumers on their own skin. Neither are those devices intended for the technically untrained public or for sale at consumer outlets. The references provide no suggestion or mention of a cosmetic product being **packaged** together with a test device. Absent such disclosure or even hint of such concept for consumer self evaluation, the combination of art does not present a prima facie case of obviousness. For this reason claims 12-14 are considered to be separately patentable from the claims of Group I. The Board is requested to consider this separable patentability.

Is claim 6 obvious under 35 U.S.C. § 103(a) over GB 2 284 154 in view of US Patent 5,088,502, and further in view of US Patent 6,270,783?

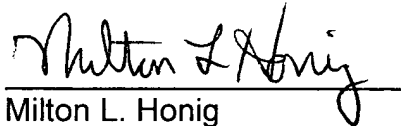
The deficiencies of GB '154 and US '502 have been discussed above. The Board is referred to that discussion, *vide supra*.

US 6,270,783 does not remedy the basic deficiencies of the primary references with respect to independent claim 1 through which it depends. None of the three references disclose the problem of allowing consumers to test efficacy of commercial anti-aging cosmetics within their own home. The references do not disclose kits or packaged together test devices with relevant cosmetic compositions. Neither is there any disclosure of fixative devices or imaging cards which allow the adhesively formed skin imprints to be preserved for prolonged periods of time. Without preservation, there

can be no hope of comparison on the progress of anti-aging cosmetic chemistry. The device and fixative are utilizable by the consumer at home. The references utterly fail to suggest either the problem or the presently claimed solution. For these reasons, the Examiner has not presented a prima facie case of obviousness.

In view of the foregoing comments, appellant requests the Board of Appeals and Interferences to reverse all of the rejections.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Milton L. Honig", written over a horizontal line.

Milton L. Honig
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201-894-2403

IX. APPENDIX

Claims On Appeal

Claim 1. A cosmetic product system comprising:

- (i) a cosmetic composition for combating signs of aging which efficacy a consumer self evaluates with a test device over an extended application period ; and**
- (ii) a test device packaged with the composition, the device having a means for evaluating progress of the combat against the signs of aging after the composition has been applied to an area of skin being monitored, the means comprising first and second strips for taking an imprint of the area of skin at different periods of time after the composition has been applied, and an imaging card for receiving and placing adjacent to one another the imprint from the first and second strip.**

Claim 2. The system according to claim 1 wherein the signs of aging comprise fine lines, wrinkles and combinations thereof.

Claim 3. The system according to claim 1 wherein the signs of aging comprise sagging skin, age spots and combinations thereof.

Claim 4. The system according to claim 1 wherein the first and second strip each comprises a water-insoluble substrate and a polymeric layer deposited onto the

substrate, the layer being conformable to skin topography when placed against the area of skin being monitored.

Claim 5. The system according to claim 4 wherein the polymeric layer is adhesive.

Claim 6. The system according to claim 5 wherein the adhesive is a polymer selected from the group consisting of acrylates, starches, gums, polyvinyl alcohol and mixtures thereof.

Claim 7. The system according to claim 4 wherein the test device further comprises a protective cover substrate positioned over the polymeric layer, the cover substrate being removed prior to application of the polymeric layer against the area of skin being monitored.

Claim 8. The system according to claim 1 wherein the first and second strip each comprises a water-insoluble substrate and an imaging layer deposited thereon, the layer being selectively sensitive to surface pretreatment, sebum, moisture, pH, temperature and topography.

Claim 9. The system according to claim 1 wherein an image of fine lines or wrinkles is formed on a component of the test device.

Claim 10. The system according to claim 9 wherein a fixative is applied to the image.

Claim 11. The system according to claim 10 wherein the fixative is selected from the group consisting of UV or natural light initiating polymerization hardening of the component forming the image.

Claim 12. The system according to claim 1 wherein the test device comprises a material selected from a cellulosic, plastic or combination material test device, and the strip is placed into a carton alongside a container holding the cosmetic composition.

Claim 13. The system according to claim 1 wherein the test device is incorporated as a panel segment of a carton protectively surrounding a container holding the cosmetic composition.

Claim 14. The system according to claim 1 wherein the test device is detachably joined to a carton protectively surrounding a container holding the cosmetic composition, joiner of the test device being through a means selected from the group consisting of perforations, weakened carton wall and adhesive joiner.

Claim 15. A method whereby a consumer can evaluate efficacy of an anti-aging cosmetic product, the method comprising:

- (A) providing to a consumer a kit which comprises:
 - (i) a proof tape comprising a support substrate provided with an adhesive on a surface thereof, the adhesive having sufficient tack to maintain an imprint of fine lines and wrinkles after removal of the tape from the skin; and
 - (ii) a fixative device for maintaining the imprint for a time longer than would occur without the fixative;
- (B) applying the cosmetic product to the skin;
- (C) placing the adhesive surface of the proof tape against the skin treated with the cosmetic product in step (B);

- (D) removing the strip and contacting same with the fixative; and
- (E) repeating steps (C) and (D) at a future time with a second proof tape followed by comparison of patterns resultant from first and second proof tape applications to the skin.